Supreme Court, U.S.
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No. 96-1378

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DEREK ROCCO BARNABEI,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITIONER'S REPLY BRIEF

MICHELE BRACE
VIRGINIA CAPITAL
REPRESENTATION
RESOURCE CENTER
P.O. Box 506
Richmond, VA 23204
(804) 643-6845

BARBARA HARTUNG
1001 E. Main Street
Suite 410
Richmond, VA 23219
(804) 649-1088

ROBERT H. KLONOFF
(Counsel of Record)
DANIEL H. BROMBERG
JONES, DAY, REAVIS &
POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioner

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REPLY FOR PETITIONER

As the petition demonstrated, this case squarely presents two significant and recurring issues that have divided the state and lower federal courts. In its opposition brief, respondent fails to offer a single valid reason why certiorari should not be granted.

ARGUMENT

A.

As explained in the petition (Pet. 8-14), there is a sharp and growing conflict among the state and lower federal courts over the indisputably important issue of when an indigent criminal defendant, faced with expert testimony for the prosecution, is entitled to the assistance of an independent expert. Furthermore, as the petition also showed (Pet. 7-8, 16), this case presents an excellent vehicle for considering the issue: the question is clearly presented and arises in the most compelling of circumstances, *i.e.*, where eligibility for capital sentencing turned upon the prosecution's expert testimony. Respondent's arguments in opposition to certiorari are meritless.

1. Respondent's brief is noteworthy not for what it says, but for what it does not — and cannot — say. First, respondent does not deny that the state and lower federal courts are hopelessly split over the proper standard to apply when an indigent criminal defendant requests the assistance of a non-psychiatric expert. Second, respondent does not dispute that this question is a significant and recurring one. Third, respondent does not make even a cursory attempt to defend the decision below. As a consequence, nothing in respondent's brief undermines petitioner's showing that review should be granted.

2. The briefs lodged by *amici curiae* underscore the importance of the issue presented here. As the brief of the National Legal Aid and Defender Association stresses, the testimony offered by medical examiners and other prosecution experts is often subjective and unreliable, frequently biased, and sometimes simply "scientifically unsound." Brief of *Amici Curiae*

the National Legal Aid and Defender Association and the New York State Association of Criminal Defense Lawyers at 6-9 (quotation omitted) [hereinafter, "National Defenders Br."].[1] Indeed, as *amicus curiae* the Virginia College of Criminal Defense Attorneys points out, one state supreme court found the testimony of a medical examiner so unreliable that it ordered a special prosecutor to investigate whether to bring charges against the examiner. *See* Brief of *Amicus Curiae* the Virginia College of Defendant Attorneys at 8 n.1 [hereinafter, "Virginia College Br."]. Nevertheless, due to the "aura of infallibility" that experts enjoy, jurors often place an inordinate amount of trust in the testimony of prosecution experts — especially where, as here, there is no defense expert to answer their testimony. *See* National Defenders Br. at 10-12.

The danger of the jury improperly crediting biased and unsound testimony was especially great in this case. As petitioner pointed out (Pet. 5), the prosecution's expert testified that the victim was unlikely to have engaged in normal, consensual sexual activities based upon vaginal bruising and an anal tear. As *amici* point out, however, there is an "overwhelming and longstanding consensus" among medical experts that "forensic testimony regarding the physical trauma resulting from an act of intercourse does not establish that the intercourse was non-consensual." National Defenders Br. at 4 (citations omitted). Thus, as *amici* demonstrate, this case addresses the very heart of the problem often raised by the prosecutor's expert testimony.

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[1] *Amici* rely in part upon a draft report from the Department of Justice Office of the Inspector General on the Federal Bureau of Investigation's laboratories, the most respected forensic laboratory in the country. *See* National Defenders Br. at 8-9. The final report, issued April 15, 1997, found "significant instances of testimonial errors, substandard analytical work, and deficient practices," including scientifically flawed testimony in a number of major cases. United States Department of Justice/Office of Inspector General Special Report, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* 2 (1997).

3. Unable to dispute that the traditional criteria for certiorari are satisfied here, respondent asserts (Opp. 8-10) that petitioner's argument before this Court is inconsistent with the argument advanced before the Virginia Supreme Court. This assertion is frivolous. Before the Virginia Supreme Court, petitioner argued that under *Ake v. Oklahoma*, 470 U.S. 68 (1985), courts have required the appointment of a defense expert "[w]here the State's case involves important expert testimony." App. Br. at 19 (citations omitted).[2] Petitioner also argued that his case was indistinguishable from *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980), which specifically rejected the suggestion that criminal defendants, faced with expert testimony presented by the prosecution, must show that a defense expert would provide favorable testimony in order to obtain independent expert assistance. App. Br. at 19-22. The Virginia Supreme Court therefore understood petitioner to be arguing there, as here, that he was entitled to expert assistance under *Ake* "because the only evidence of rape adduced at trial was the medical examiner's testimony." Pet. App. 9a. As the Virginia Supreme Court both considered and ruled on this claim, Pet. App. 9a-10a, there can be no doubt that petitioner's claim was properly raised below. *See, e.g.*, *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *see also Raley v. Ohio*, 360 U.S. 423, 436-37 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.").

Nonetheless, respondent contends (Opp. 8-9) that petitioner waived this claim by arguing in his petition for rehearing that he should prevail under the standard applied below and in *Husske v. Commonwealth*, 476 S.E.2d 920 (1996), *cert. denied*, 117 S. Ct. 1092 (1997). Plainly, however, petitioner did not seek to apply *Husske* on appeal: indeed, as respondent acknowledges (Opp. 8), *Husske* was not handed down until the day of the decision below. More fundamentally, a party does not waive properly raised

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[2] Relevant excerpts from petitioner's brief before the Virginia Supreme Court, and from his petition for rehearing before that court, have been lodged with the clerk of this Court.

arguments challenging a rule simply by arguing on rehearing that he also prevails under that rule. Respondent offers no rationale for this absurd proposition, and none of the cases that he cites even remotely supports it.[3]

In any event, the arguments made by petitioner below in his petition for rehearing were in no way inconsistent with the arguments advanced here and in his original brief before the Virginia Supreme Court. While petitioner contended that he should have received expert assistance under *Husske*, he continued to rely upon *Ake* and *Williams*. Pet. Reh. at 5-8. Moreover, he specifically criticized *Husske*'s requirement that criminal defendants make a "particularized showing" of the testimony that a defense expert would present as being without basis "under the very federal law which the *Husske Rule* claims to invoke." *Id.* at 7-8 (quotation omitted). In short, contrary to respondent's desperate suggestion, petitioner made the same basic arguments in his petition for rehearing that he now urges this Court to consider.[4]

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[3] In each of the cases cited by respondent, the petitioner failed to raise the claim in question at *any* point in the courts below. *See United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994) ("Respondent, however, did not raise a Fourth Amendment claim in the District Court or the Court of Appeals . . . ."); *Springfield v. Kibbe*, 480 U.S. 257, 258 (1987); *Webb v. Webb*, 451 U.S. 493, 498 (1981) ("We cannot conclude on this record that petitioner raised the federal claim that she now presents to this Court at any point in the state-court proceedings."); *Cardinale*, 394 U.S. at 438 (noting that "the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below"). Thus, none of these cases can be read to support respondent's suggestion that an argument properly raised on direct appeal can be waived by making a narrower (or even different) argument on rehearing.

[4] Because petitioner did not rely upon the standard applied by the court below in either his brief on appeal or his petition for rehearing, respondent's contention that this petition presents a "fact-specific" application of that standard (Opp. 9-10) is specious.

4. Respondent also argues (Opp. 12) that petitioner was not prejudiced by the denial of expert assistance because his counsel "was well-equipped to cross-examine" the medical examiner.[5] This argument is without merit. As respondent observes (Opp. 12), trial counsel was able to force the medical examiner to concede that the bruising he observed on the victim might have been caused by "generic rough sex." 5 Tr. 1832-33. Trial counsel was not, however, able effectively to challenge the medical examiner's testimony that the bruising was caused by a "violent penetration" and was "very unlikely" to have occurred during "normal sexual intercourse." 5 Tr. 1804-05. Moreover, because trial counsel was apparently unaware of the skepticism with which most medical experts view this type of forensic testimony, *see* National Defenders Br. at 4-5, he was unable to demonstrate the fundamentally unscientific and unsound nature of the medical examiner's conclusions. Thus, far from demonstrating that no expert assistance was necessary, trial counsel's vigorous but medically unsophisticated cross-examination underscores that lay cross-examination is a poor substitute for expert assistance.[6]

The Commonwealth also attempts to divert attention from the medical examiner's testimony by asserting (Opp. 11-12) that the medical examiner "never remotely opined as to whether any sexual intercourse had been consensual" and that the prosecutor relied upon the brutality of the victim's murder as proof that the sexual relations were not consensual. This contention is

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[5] Although respondent also points out (Opp. 10-11) that petitioner moved to exclude the testimony of the medical examiner, it does not explain the relevance of this fact. As demonstrated in the petition and the briefs of *amici curiae*, having lost on that motion, petitioner's only hope of receiving a fair trial was to secure the appointment of his own expert.

[6] The prejudice that petitioner suffered as a result of the medical examiner's testimony goes beyond the rape conviction and death sentence: had the jury understood the flaws in the testimony of the prosecution's expert, it may have concluded that petitioner did not commit the rape or the murder of the victim.

disingenuous. Given petitioners' prior history of consensual sex with the victim,[7] evidence that the victim was brutally murdered is hardly proof that petitioner engaged in nonconsensual sexual relations with the victim. Moreover, as petitioner pointed out (Pet. 5), the Commonwealth specifically argued to the jury that, because the medical examiner testified that the victim's bruises "cannot occur without some force," "we know that the sex that the defendant had wasn't voluntary consensual sex." 9 Tr. 3296-97. Thus, having relied heavily at trial on the medical examiner's testimony, the Commonwealth cannot now claim in good faith that the testimony was inconsequential.

5. Respondent's final argument (Opp. 9 n.3) is that certiorari should be denied in this case because this Court denied certiorari in the *Husske* case. This argument is also without merit. First, it is well-settled that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *United States v. Carver*, 260 U.S. 482, 490 (1923). As Justice Brennan has noted, this Court may deny certiorari in one case and then "take the very next case raising the same question." R. Stern & E. Gressman, *Supreme Court Practice* 240 n.56 (7th ed. 1993) (quoting W. Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar Ass'n Q. 393, 402-3 (1960)).[8] Second, there was an obvious reason why certiorari was not granted in

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[7] While the Commonwealth appears at one point (Opp. 3) to suggest that petitioner did not engage in sexual relations with the victim, as the petition demonstrated (Pet. 4 & n.1), the testimony of the Commonwealth's own witnesses overwhelmingly established such relations.

[8] *Maggio v. Williams*, 464 U.S. 46 (1983) (per curiam), does not suggest otherwise. In *Maggio*, the Court considered a stay of execution and, in so doing, looked to prior denials of certiorari because the standard for granting a stay of execution is whether there is "a reasonable probability that four members of the Court would consider the [issues in the case] sufficiently meritorious for the grant of certiorari." 464 U.S. at 48 (quotation omitted). This Court has never extended *Maggio* beyond this narrow context.

Husske: the defendant in that case "confessed to the crimes" for which he was convicted. *Husske*, 476 S.E.2d at 926. Indeed, *Husske* was such an obviously poor vehicle for addressing the right of indigent criminal defendants to expert assistance that the Commonwealth waived its right to respond to the petition in that case. This case, by contrast, presents a perfect vehicle for considering this issue. Review by this Court should be granted.

B.

The second question presented by this case is whether a state may prevent a defendant threatened with the death penalty from informing a capital sentencing jury that he or she will be ineligible for parole for a substantial period of time. As the petition demonstrates (Pet. 20-21), this important and recurring question, which was left open in *Simmons v. South Carolina*, 512 U.S. 154 (1994), has divided the state and lower federal courts.

1. Once again, respondent's brief is most notable for what it omits. Here, too, respondent does not deny that there is a conflict among the lower courts or that the issue left open in *Simmons* is both important and recurring. The Commonwealth also does not dispute that this Court's decision in *O'Dell v. Netherland*, *see* 117 S. Ct. 631 (1996) (No. 96-6867) (granting certiorari), may shed light on the issues raised in this petition and that it would therefore be worthwhile to hold this case pending disposition of *O'Dell*.

2. Instead, respondent asserts (Opp. 13-14) that petitioner advanced a "narrow, case-specific argument" based upon three facts: trial counsel asked to provide the jury with accurate parole information; the Commonwealth asserted that petitioner posed a future danger to society; and the jury asked about petitioner's parole eligibility. In every *Simmons* case, however, the state argues that the defendant presents a future danger and the defendant asks to provide the jury with accurate parole information. Moreover, while petitioner pointed out that the jury asked about his parole eligibility, his argument did not turn upon that fact. *See* App. Br. at 48-54. It should come as no surprise

then that the Virginia Supreme Court did not treat petitioner's argument as narrow and fact-specific. *See* Pet. App. 16a.

3. Respondent's assertion (Opp. 15) that *Simmons* somehow rejected petitioner's due process argument is groundless. The lower courts would not be in conflict over this question if this Court had definitely resolved it. Moreover, contrary to respondent's suggestion (Opp. 15), the plurality and concurring opinions in *Simmons* did not limit their application of the due process right to rebut claims of future dangerousness to instances of parole ineligibility; those opinions simply limited their holdings to the facts before the Court. Indeed, Justice Scalia took the position that the reasoning in *Simmons* could not be limited to defendants permanently ineligible for parole. In his view, the decision was "at least as sweeping as this: that the Due Process Clause overrides state law limiting the admissibility of information concerning parole *whenever* the prosecution argues future dangerousness." 512 U.S. at 183 (Scalia, J., dissenting) (emphasis in original).

4. Respondent's suggestion (Opp. 16) that this Court should not review petitioner's Eighth Amendment argument because the plurality in *Simmons* left the question open is specious. That this Court has left a question unresolved is a reason for *granting* certiorari, not denying it. *See, e.g. Dolan v. City of Tigard*, 512 U.S. 374, 374 (1994), *Georgia v. McCollum*, 505 U.S. 42, 46 (1992).

5. Respondent also argues (Opp. 14) that these questions are not worthy of certiorari because this Court has previously denied other petitions raising the same issue. As demonstrated above, *see supra* p. 6, that argument is without merit.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

MICHELE BRACE
VIRGINIA CAPITAL
REPRESENTATION
RESOURCE CENTER
P.O. Box 506
Richmond, VA 23204
(804) 643-6845

BARBARA HARTUNG
1001 E. Main Street
Suite 410
Richmond, VA 23219
(804) 649-1088

ROBERT H. KLONOFF
(Counsel of Record)
DANIEL H. BROMBERG
JONES, DAY, REAVIS &
POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioner

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